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Supreme Court, U.S.
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No. 08-469

In the Supreme Court of the United States

DEVON HOWARD TOEPFER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government opposes the petition, contending that the guideline sentencing process properly bars a defendant's reliance on an acquittal. The government also argues that the circuit conflict as to plain error review in the post-*Booker*[1] sentencing context remains transitional nearly four years after it first appeared and that a violation of the statutory mandate to consider more than just the guideline range in imposing sentence does not affect substantial rights absent case-specific evidence showing that procedural compliance would lead to a lower sentence.

Contrary to the government, federal sentencing courts' reliance on acquitted conduct raises questions of fundamental importance that the Court should address. Similarly, resolving the circuit conflict as to review of plain sentencing error is crucial to appellate scrutiny of discretionary guideline sentencing.

I. THE COURT SHOULD RESOLVE WHETHER THE FIFTH AND SIXTH AMENDMENTS LIMIT GUIDELINE SENTENCING BASED ON ACQUITTED CONDUCT.

The government's brief suggests that the district court's representations to petitioner–as part of a plea-related colloquy–that the jury's special verdict sentencing findings would *bind* the court at sentencing can be interpreted as bearing only on the mandatory minimum of the statutory sentencing range and not the federal sentencing guideline range. BIO 3

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

(conceding district court's pretrial assurance to petitioner that at sentencing it "would have '*no discretion*' as to the sentence, petitioner would be sentenced to at least ten years of imprisonment, and the court 'would be bound to *any* finding that the jury makes'") (quoting 12/5/05 Tr. 3) (emphasis added).[2] More generally, the government disputes whether the Due Process Clause is implicated where a defendant mistakenly relies on a district court's representation that it will be bound by a jury's special verdict findings.

The government also notes that there is no apparent circuit conflict concerning guideline use of acquitted conduct and that language in the Court's post-*Apprendi*[3] guideline decisions supports the use of acquitted conduct on the theory that the defendant's constitutional rights are affected only if the statutory maximum is raised. BIO 7-9.

Despite the government's opposition, there are strong bases for the Court's review. The case against review of the acquitted conduct dilemma rests on a triad of false premises: that defendants have no constitutional basis for reliance on the jury trial process as a means of testing their claims of innocence or partial innocence, even where reliance is heightened, as in petitioner's case, by the district court's specific pretrial representation that the jury

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[2] The district court adopted the presentence report setting a lower mandatory minimum level based on the jury's finding of less than 1000 marijuana plants in the marijuana conspiracy, but ignored the jury's findings for purposes of setting the guidelines that drove the sentence.

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

verdict and findings will have a binding effect at sentencing; that under the court of appeals' decision, district courts arguably are free to either ignore acquitted conduct in calculating the guidelines or vary from the guideline range so as to eliminate the guideline effect of such conduct; and that routine use of acquitted conduct to set criminal punishment does not erode the constitutional design for, and the public's confidence in, the judicial system and the relevance of the role of the jury. *See* BIO 6 ("[T]here is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury."); *id.* at 8 (arguing that deference to jury verdicts in guideline context is "incongruous" given that uncharged conduct can be considered in sentencing).

1. Regarding the due process question raised by guideline use of acquitted conduct despite a defendant's reliance on contrary trial court representations, the government proposes a reading of the record that goes beyond that of the court of appeals, which concluded merely, as an alternative ground for affirmance, that the record did not establish a valid "agreement" by the parties to rely solely on the jury verdict as the basis for sentencing. Pet. App. 6a-7a; *id.* at 7a (citing circuit authority precluding binding effect of parties' plea-based guideline calculation agreement).

Regardless of whether there was a meeting of the minds about the meaning of the district court's representations (and warnings) to petitioner, there is a substantial basis to conclude that petitioner went to trial in reliance on express assurances of the binding effect of the jury's special verdict, as the uncontested

statement by defense counsel at sentencing shows. *See* 4/19/06 Tr. 4 (citing trial court's pretrial warning to petitioner that "because th plea didn't go through, ... the jury was going to make the factual determinations as to the amount of plants"). Nothing in the decision of the court of appeals contradicts petitioner's actual reliance on the district court's representation. Instead, the clear thrust of the court of appeals' decision is that the guideline system renders such reliance unenforceable. Pet. App. 7a.

Notably, the government ignores that the trial prosecutor also proceeded at trial in reliance on the same understanding of the district court's representation, as seen in the government's request for special jury verdict findings on specific amounts of drugs for the determination of elevated guideline levels. *See* 12/16/05 Tr. 64.[4]

Nor is there a principled basis for the distinction the government seeks to draw between the binding effect of a special verdict on the guideline range and a similar effect of the verdict on the statutory minimum, in that, as the Court explained in *Harris v. United States*, 536 U.S. 545 (2002), there is no jury trial right to determination of facts implicating a mandatory minimum. Presuming that a defendant will parse out a legally-mistaken distinction between the statutory minimum and the top of the guideline range is unwarranted, and, in fact, as the special verdict requests by the trial prosecutor show, not even the

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[4] Not only did the jury make specific findings rejecting government allegations of a higher quantity of marijuana, it also acquitted petitioner of three of the four substantive counts of marijuana growing.

government thought the district court's representation as to the binding effect of the jury findings was limited to the mandatory minimum.

The government gives short shrift to the due process implications of a defendant's reliance on a jury's verdict and special findings, noting merely that *Smith v. Massachusetts*, 543 U.S. 462 (2005), was decided under the Double Jeopardy Clause. BIO 10 n. 6. The Court explained in *Smith* that trial strategies are based on district court rulings as to what is or is not being tried in the case and that substantial prejudice can result from such reliance if the trial court is permitted to later revisit the question and change its mind. Although the Court did not hold that such prejudice amounts to a due process violation, *see* 543 U.S. at 473 n. 7 (relying on the Double Jeopardy Clause, but disputing "the dissent's due-process analysis"), the reliance or fair warning concept is plainly part of due process, just as the opinions of circuit judges questioning the use of acquitted conduct explain that the upsetting of expectations about the respect owed a verdict impacts not merely the defendant, but society at large, and is a principal adverse consequence of unrestrained use of acquitted conduct to punish criminal defendants.[5]

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[5] Due process concerns were also noted by the Court in *United States v. Watts*, 519 U.S. 148 (1997). *See, e.g., United States v. Hurn*, 496 F.3d 784, 788-89 (7th Cir. 2007) (circuit conflict cited in *Watts*, as to whether preponderance burden is too low where sentence is based almost entirely on acquitted conduct, persists). That petitioner's reliance arose in the context of plea discussions is notable given that the

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2. Conceding that the Court has not addressed the role of acquitted conduct in guideline sentencing since its pre-*Apprendi* holding, in *United States v. Watts*, 519 U.S. 148 (1997), that double jeopardy does not bar such use, the government does not address mounting evidence of the erosion of both the constitutional process for criminal adjudication and the societal understanding of the role of the people–as jurors–in that process. Taking instead the approach of noting that no circuit has reversed a sentence based on acquitted conduct, the government does not address the merits of the analyses of dissenting circuit judges.[6]

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[5] (...continued)
constitutional validity of the plea bargaining balance is premised on the parties' relatively equivalent leverage due to a defendant's trial rights. *See Bordenkircher v. Hayes*, 434 U.S. 357, 362-63 (1978). With acquitted conduct sentencing, if a jury trial settles nothing about crucial sentencing disputes, any trial-right leverage is reduced, increasing the pressure on defendants to reach a plea agreement that sets guideline limits. The resulting scheme ironically allows "real offense sentencing" to undermine a principal goal of the Sentencing Reform Act: to reduce disparity by mitigating distorting effects of plea bargaining.

[6] *See, e.g., United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring); *United States v. Grier*, 475 F.3d 556, 586 n. 34 (3d Cir. 2007) (Ambro, J., concurring); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

The government also does not address the concerns raised by the District of Columbia Circuit, in *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008), that "defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence" and "that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence."[7] *See United States v. Turner*, No. 07-3107, __ F.3d __, 2008 WL 5101309 (D.C. Cir. Dec. 5, 2008) ("[I]ndeed, the actual impact of *Booker* on sentencing has been minor."). The detachment of theory from reality noted in *Settles* is of course more pronounced in cases where special verdict findings are employed and where parties are incorrectly given to understand that the jury findings will be binding, but it is present at some level in nearly every acquitted conduct case. *Canania*, 532 F.3d at 777 (Bright, J., concurring) ("[T]he use of 'acquitted conduct' to enhance a sentence violates the Due Process Clause of the Fifth Amendment. ... [T]he consideration of

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[7] In the first year following *Booker*, 98.6% of within-guideline sentences appealed were affirmed, and 78.3% of below-guideline sentences were reversed. See Court of Appeals Review 12/1/05-11/30/06 at 2, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf. In the first quarter of 2007, 11.9% of sentences were non-government-sponsored below guideline sentences, and 86.7% were within-guideline or government-sponsored below-guideline sentences. U.S. Sentencing Commission, Preliminary Quarterly Data Report, http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf.

'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding.").

The government does not address the District of Columbia Circuit's divergence in *Settles* from the Eleventh Circuit's holding in petitioner's case. *Settles*, 530 F.3d at 924 (concluding that "even though district judges are not required to discount acquitted conduct, the *Booker-Rita-Kimbrough-Gall* line of cases may allow district judges to discount acquitted conduct in particular cases–that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate"); BIO 10 n. 6 (claiming that petitioner misreads the Eleventh Circuit's decision when he asserts that the court of appeals' use of the term "obligation" to count acquitted conduct indicates that counting such conduct for guideline purposes is mandatory). But the decision of the court of appeals makes it clear that the Eleventh Circuit deems rejection of the guideline level based on an opposition to the use of acquitted conduct impermissible even where the parties agree to such a calculation and treats as closed the issue of guideline use of acquitted conduct.[8]

Nor does the government recognize the

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[8] Given statutory ambiguity regarding use of acquitted conduct, *see* 18 U.S.C. § 3553(a)(1), (2), (6), 28 U.S.C. §§ 991(b)(1)(B), 994(c)(2), (3), there can be no presumption that Congress required such use in guideline calculations. The avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

significance of the still-unresolved *en banc* proceedings in the Third Circuit which, for more than a year, has had under consideration the question of whether acquitted conduct may be used to set guideline sentences. *United States v. White*, 503 F.3d 487 (6th Cir. 2007) (rehearing *en banc* granted Nov. 30, 2007). The persistence of the issue is undoubtedly based on "the jury's central role in the criminal justice system," *Canania*, 532 F.3d at 776 (Bright, J., concurring), and the damage to the constitutional structure caused by a derogation of the jury's verdict, a judgment the jury is told is meant to speak the truth. This case presents the Court with an ideal opportunity to explain the limits of sentencing consideration of acquitted conduct.

II. THE COURT SHOULD RESOLVE THE CONFLICT AS TO PLAIN ERROR REVIEW OF SENTENCING ERRORS.

In opposing resolution of the long-standing circuit conflict in the application of the substantial-rights prong of plain error review in sentencing appeals, the government claims that the district court gave some consideration to statutory factors, even though the court of appeals assumed that it did not, BIO 10; admits a circuit conflict on the issue, but argues that the conflict is still transitional, BIO 12; and disputes any tension between the court of appeals' decision and *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 (2004), because the court of appeals found no record evidence indicating a probability of a different result absent the error. BIO 13.

1. The government claims that the district court's reference to the presentence report (PSR) and

mention the "statutory factors" addressed in the PSR implies that the district court complied with the obligation to base its sentence on statutory factors going beyond the guidelines, under 18 U.S.C. § 3553(a). BIO 11 ("[B]efore announcing its sentence, the court explained that it had considered the presentence report, which contained the advisory guidelines calculations as well as material bearing on the "statutory factors ... ."). But the court of appeals did not accept that claim, and the district court's rote reference to the PSR, a document prepared principally to set the guideline range, did not meet the essential statutory requirement to consider all relevant factors without singular reliance on the guidelines. Notably, under Fed. R. Crim. P. 32(d), a PSR addresses guideline calculations and departure grounds, but need not give notice of variance issues. *See Irizarry v. United States*, 128 S.Ct. 2198 (2008). Petitioner's PSR, following the direction of Rule 32(d), neither addressed the statutory factors nor acknowledged the possibility of a variance. The record leaves little doubt that the contested issues regarding the use of acquitted conduct at petitioner's sentencing hearing completely subsumed all other discussion and considerations. The court of appeals correctly reached the merits of the plain error claim.

2. The government seeks to distinguish two types of *Booker* error: treatment of the guidelines as mandatory and failure to consider statutory factors other than the guidelines. BIO 12. However, this distinction is more formal than real, for in failing to consider non-guideline factors, the district court effectively eliminates any basis for imposing a non-guideline-based sentence. And the government's

suggestion that such erroneous guideline-deferential sentencing is merely a transitional phenomenon is unfounded, particularly in light of sentencing statistics showing the dominant role of the guidelines. *See* note 7, *supra*.

Nor does the question presented–whether "a defendant, in order to show the harmfulness of the violation of forfeited procedural rights at sentencing, must present evidence that the sentence would have been lower but for the violation"–turn on the precise form of *Booker* error committed by the district court, but rather on the importance of procedural compliance in order to ensure that the *Booker* promise of advisory guidelines can be realized in sentencing dispositions.

3. The government claims that the Court's plain error analysis in *Dominguez-Benitez*, 542 U.S. at 81 (substantial rights affected only where there is a "reasonable probability" of effect on outcome), is indistinguishable from the court of appeals' standard that requires presentation of evidence that the district court would have imposed a lower sentence, but for the court's failure to consider non-guideline factors. See Pet. App. 10a (holding that "neglecting to consider the § 3553(a) factors" does not affect substantial rights absent record evidence pointing to lower sentence).

The government does not address the critical preponderance-of-the-evidence component of the Eleventh Circuit's interpretation of the "reasonable probability" standard, as first set forth in *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005), and applied in petitioner's case. Under *Rodriguez*, there can be no such reasonable probability if "[t]he record provides no reason to believe any result is more likely than the other," or if "the effect of an error on the

result in the district court is uncertain or indeterminate." *Id.* This preponderance component–which virtually immunizes from review procedural error, no matter how fundamental–directly conflicts with the decisions of other circuits and merits the Court's review.

Particularly in light of the Eleventh Circuit's extension of the *Rodriguez* prejudice rule from "plain *Booker* error" to other sentencing contexts, the Court should address application of *Dominguez-Benitez* and resolve the meaning of a "reasonable probability" of a different result in sentencing proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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